

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL R. WARE,)
)
 Plaintiff,) Civil No. 03-3080-CO
)
 v.) O R D E R
)
DEPARTMENT OF THE INTERIOR;)
et al.,)
)
 Defendants.)

The court dismissed this action after granting defendants' motion for summary judgment. Plaintiff subsequently filed a "motion for a mistrial." (#73). Plaintiff later filed a "motion for relief from order and judgment; motion to rescind 'motion for mistrial.'" (#74). Plaintiff's motion to rescind the motion for a mistrial is granted and the motion for a mistrial is denied as moot.

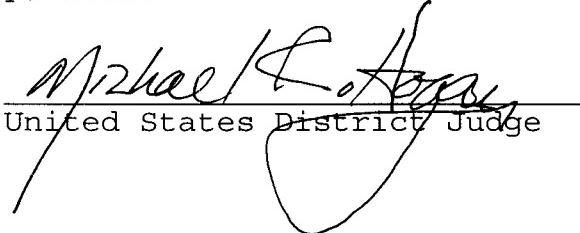
Concurrent with his motion for relief from judgment, plaintiff filed a notice of appeal. Thus, plaintiff seeks to have this court

and the Ninth Circuit Court of Appeals consider issues raised in this case simultaneously. However, the notice of appeal divested this court of jurisdiction to consider the issues raised in the appeal. A district court lacks jurisdiction to entertain a Rule 60(b) motion, filed after a notice of appeal. See Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004) (vacating, for lack of jurisdiction, order denying Rule 60(b) motion where the motion was filed after the notice of appeal and movant did not follow the procedure for seeking a remand of the case back to district court); Carriker v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992) (en banc) (same). To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move the Circuit Court, if appropriate, for remand of the case. Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984). Plaintiff has not followed this procedure and therefore the motion is denied for lack of jurisdiction.

CONCLUSION

For the reasons stated above, plaintiff's motion for a mistrial (#73) is denied as moot and plaintiff's motion for relief from order and judgment (#74) is denied for lack of jurisdiction.

DATED this 12th day of July, 2005.


Michael E. Hayes
United States District Judge